

**IN NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT- V**

C.P. IB/831/2022

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with Rule
4 of the Insolvency and Bankruptcy
(Application to Adjudication Authority)
Rule 2016)

In the matter of

**IDBI Trusteeship Services Limited,
(U65991MH2001G0I131154)**

Asian Building, Ground Floor, 17, R.
Kamani Marg, Ballard Estate, Mumbai
400 001

.....Financial Creditor/ Petitioner

Vs

**Cuquator Media Services Private
Limited,**

(U72900MH2006PTC164508)

18th Floor, A Wing, Marathon Futurex,
N. M. Joshi Marg, Lower Parel, Mumbai
400013

.....Corporate Debtor/ Respondent

Order Pronounced on: 23.06.2023

Coram:

Hon'ble Sh. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearance of parties:

For the Petitioner:

Senior Counsel Mustafa Doctor a/w Counsel Spenta Havewala a/w Counsel Ranjeev Carvahlo a/w Mr. Sachin Chandarana and Ms. Mahek Naik i/b M/s. Manilal Kher Ambalal and Co.

For the Corporate Debtor:

Mr. Nausher Kohli a/w Rushab Chopra i/b Vidhii Partners

Per: Kuldip Kumar Kareer (Judicial)

ORDER

1. This Company Petition is filed by the Petitioner, namely IDBI Trusteeship Services Limited, (hereinafter called "**Financial Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Cuquator Media Services Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate Debtor has committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Financial Debt of Rs. 599,05,69,179/-.

BRIEF FACTS OF THE CASE

2. In and around 2015, Essel Infraprojects Limited (hereinafter referred to as "**the Essel**") proposed to issue 425 rated, unlisted, redeemable, non-convertible debentures in 2 Series, being the Series I debentures and

Series II debentures, with each debenture having a face value of Rs. 1 Crore, aggregating to Rs. 425,00,00,000/- on private placement basis.

3. At the request of the Essel, the Applicant agreed to act as Debenture Trustee for the benefit of Franklin Templeton Asset Management (India) Private Limited (hereinafter referred to as **“the Debenture Holder”**).
4. Pursuant to this, the Essel and the Applicant executed a Debenture Trust Deed on 22.05.2015 (hereinafter referred to as **“DTD”**) recording terms and conditions as well as the obligations. In addition to the aforesaid Share Pledge Agreement, and in order to secure all the payments with respect to the said debentures Corporate Debtor and Direct Media Ventures Private Limited (Collectively referred to as **“Corporate Guarantors”**) executed a Corporate Guarantee dated 22nd May 2015 in favour of the Applicant, whereby the Guarantors jointly, severally, irrevocably and unconditionally guaranteed the obligation of Essel with respect to the debentures as well as obliged to make payments under the DTD.
5. In order to secure all the payments with respect to the said debentures, the Corporate Debtor herein and Direct Media Ventures Private Limited (Collectively referred to as **“Corporate Guarantors”**) executed a Corporate Guarantee dated 22.05.2015 in favour of the Applicant, whereby the Guarantors jointly, severally, irrevocably and unconditionally guaranteed the obligation of Essel with respect to the debentures as well as obliged to make payments under the DTD.
6. The debt amount of Rs. 425,00,00,000/- was disbursed in two tranches i.e. First Series of Rs. 200,00,00,000/- on 22.05.2015 and Second Series of Rs. 225,00,00,000/- on 24.06.2015.
7. During the period of January 2019, the Essel group of Companies faced severe liquidity crisis which seriously jeopardized the ability of the Essel

to fulfil its financial obligations under the DTD. In particular, certain shares pledged as security by the Corporate Guarantors/Pledgors towards the payment obligations under the DTD witnessed a down fall in value, compromising the rights and interests of the Debenture Holders.

8. In order to create additional security, DTD was amended by virtue of Supplemental and Amended Debenture Trust Deed dated 25.06.2019, which was executed by and between the Essel and the Applicant, under the Amended Debenture Trust Deed (hereinafter referred to as **“Amended Deed”**) whereby 60,28,000/- shares of Essel were agreed to be pledged by an entity call ‘Khoobsurant Infra Pvt. Ltd. in favour of the Applicant.
9. In September 2019, the Essel requested the Applicant for the release of 30,09,000 Zee shares pledged as security with the Applicant. Accordingly, the Applicant released 30,09,000 shares towards payment of outstanding dues resulting in redemption of 74 out of 424 NCDs.
10. On 22.05.2020, the remaining 351 NCDs fell due for redemption. However, Essel defaulted in payment of the principal amount of NCDs and redemption premium thereon.
11. The Applicant time and again called upon the Essel, the Corporator Debtor and other Guarantor and Pledgors to make payment of the balance defaulted amount in respect of the Debentures. Communications / Reminders have also been addressed by Applicant in this regard to the Corporate Guarantee from time to time.
12. The Applicant finally invoked the Personal Guarantee on 12.06.2020 furnished by Mr. Subhash Chandra and called upon to repay the outstanding obligation in respect of the said NDC’s outstanding as on 05.06.2020. The Applicant has also invoked the Corporate Guarantee dated 12.06.2020.

13. Since the Corporate Debtor failed and neglected to honor its contractual obligations, the Applicant sent a Demand Notice to the Corporate Debtor, calling upon them to make payment of Rs. 591,81,92,216/- as on 9.05.2022.
14. The Corporate Debtor has failed in repayment of the dues, which necessitated the Applicant to file the present Application for initiating the corporate Insolvency Resolution process of the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016.

REPLY FILED BY THE RESPONDENT

15. At the outset, the Respondent denied all the contents averred in the present Petition.
16. It has been submitted by the Respondent that in the present case, the Applicant did not fall under the Definition of 'Financial Creditor' under Section 5(7) of the Code and the Applicant did not owe a 'Financial Debt', as defined under Section 5(8) of the Code.
17. It has been submitted that the Pledge as well as Guarantee have been invoked on 12.06.2020, therefore, the default, if any, was committed by the Issuer which fell due and two days after the Issuer has received the Demand Notice. It has further been submitted that as per DTD, the Debentures had matured on 22.05.2020 and, therefore, the date of default with respect to the Debentures falls within the period under Section 10A of the Code. Relying upon the above stated contention, the Respondent has submitted that the date of default mentioned by the Applicant at Item No. 2 of Part-IV of the Petition as 15.05.2022 is false and incorrect.
18. The Respondent has submitted that the Debenture Trustee is required to take the written instructions from the Majority Debenture Holders, before initiating any action, or exercising any rights or performing any duty

- under the Debenture Trust Deed. It has, therefore, submitted that since the Applicant (Debenture Trustee) did not have any written instructions from the Majority Debenture Holders, the Applicant cannot have an absolute and uncontrolled discretion as far as invocation of the security is concerned.
19. It has further been submitted by the Respondent that the Applicant did not have a locus to file the present Petition in the absence of an appropriate Resolution passed by the Board of Directors of the Applicant nor any Board Resolution in favour of Mr. Gaurav Rane has been annexed with the Petition.
 20. The Respondent has further submitted that the Applicant has annexed 'Cash Transaction' Reports issued by HSBC, which has not been corroborated by the HSBC itself nor has it been duly certified by the appropriate officer of HSBC.
 21. With the above averments, the Respondent has prayed for the dismissal of the present Petition.

REJOINDER FILED BY THE APPLICANT

22. On the contention raised by the Respondent that the Applicant did not fall under the definition of financial creditor, it has been submitted that this is completely falsified by the fact that the Corporate Debtor 'herein has expressly admitted the execution of the Corporate Guarantee dated 22.05.2015 towards the debt of Essel Infra projects Ltd. (**"ESSEL"**) arising in relation to non-convertible debentures of principal amount of Rs. 425 crores under the Debenture Trust Deed dated 22.05.2015.
23. The Applicant has submitted that there has been continuous cause of action and the same is undisputed. In this regard, the Applicant has placed reliance upon the Order of the Hon'ble Delhi High Court dated

03.07.2020 and it is also stated that the present claim has arisen post realisation of the sale of ZEEL Shares in the month of August and September 2020 and DISH Shares in the month of November and December 2020. It has further been submitted that the Respondent has not responded to the Notice dated 13.05.2022, therefore, the contention of Section 10A deserves to be dismissed.

24. It has been submitted that the Applicant has acted based on the instructions received from the Debenture holders including filing of the present Company Petition which is evident from the email dated 06.03.2023, whereby the instructions are confirmed and ratified by a majority of the Debenture Holders.
25. The Applicant has further submitted that in the event of continuous cause of action, the date of default is correctly mentioned in the Company Petition as 15.05.2022.
26. It has been submitted that as of the date of filing of the petition i.e., 12.07.2022, the certificate as required under the Bankers Book Evidence Act, 1891 was not mandatory. In any event and without prejudice, this is a curable defect and the certificate under the said Act has been annexed with the rejoinder.
27. With the above averments, the Applicant has prayed for the admission of the present Petition.

FINDINGS

28. We have heard the Ld. Counsels appeared for the parties and perused the record available.
29. The present Company Petition has been filed by the Financial Creditor seeking to initiate the Corporate Insolvency Resolution Process against

the Corporate Debtor for the default in repayment of the claim of Rs. 599,05,69,179/-.

30. It is an undisputed fact of the case that the Essel Infra projects Limited ("**Essel**") had issued 425 rated, unlisted, redeemable, non-convertible debentures in 2 Series, and each debenture having a face value of Rs. 1 Crore, aggregating to Rs. 425,00,00,000/- on private placement basis. The Applicant herein was appointed as the Debenture Trustee for the Debentures issued by the Essel. The Applicant and the Essel had executed the Debenture Trust Deed (DTD) dated 22.05.2015. The Respondent /Corporate Debtor and Direct Media (Corporate Guarantors) had duly executed a Corporate Guarantee dated 22.05.2015 against the Debentures issued by the Essel Infra Projects. Debenture Trust Deed dated 22.05.2015 was amended by the Supplemental Debenture Trust Deed dated 25.06.2019. The Applicant had issued a Demand Notice dated 12.06.2020 to Essel calling upon to redeem the said NCDs and repayment of full outstanding claim. The Applicant had also invoked the Corporate Guarantee on 12.06.2020 and requested the Corporate Debtor herein to repay the outstanding claim amount with two business days.
31. The primary issue that needs to be resolved in the present petition is –
Whether the Petition is covered under Section 10-A of the Code?
32. In order to address the issue, a reference has to be made to the Debenture Trust Deed dated 22.05.2015 more particularly clause 7.1 and 7.2 of the said document which was duly signed and stamped by both the parties. The extract of the same is reproduced below:

“7. Tenure and Redemption

*7.1 The tenure of the Series I Debentures shall be the period commencing from the Series I Allotment Date and ending on **May 22, 2020.***

*7.2 The tenure of the Series II Debentures shall be the period commencing from the Series I Allotment Date and ending on **May 22, 2020.***

33. From the above referred clauses, it is clearly evident that the date of maturity of the NCDs was 22.05.2020. Since the same was not redeemed on the date of maturity, the default came into being on 22.05.2020.
34. Further, the Respondent has relied on clause 4 of the Corporate Guarantee dated 22.05.2015. The extract of the same is as under:

***“For the purposes of invoking the Guarantee issued** in terms hereof, the Debenture Trustee shall, either upon (a) the occurrence of an Event of Default in terms of the Transaction Documents or (b) failure to deposit the Outstanding Amounts in the Designated Account, upon the exercise of Put Option or Call Option (as the case may be), 5 (Five) Business Days before the Put Option Date or Call Option Date (as the case may be) or (c) **upon any default in making Payments, issue a notice to the Guarantors in writing,** in the form given in Schedule II hereto ("Notice of Demand") upon the receipt of which the Guarantors agrees and undertakes that the Guarantors shall, without any demur or protest and **on first demand, make payment of the amount demanded thereunder within 2 (Two) Business Days of receipt of the Notice of Demand,** which payment shall be made for the amount mentioned in the Notice of Demand without any deduction whatsoever. The Guarantor consents that 2 (Two) Business Days is a just and reasonable time to arrange for the funds in case of an Event of Default.”*

35. From the above, it is clear that a Notice of Demand was to be issued by the Debenture Trustee upon any default in making the payments. Based upon the aforementioned clause of Deed of Guarantee, the Applicant

issued the Demand Notice dated 12.06.2020 for Redemption of NCDs requesting the Corporate Guarantor/ Respondent to repay the outstanding amount within a period of two business working days. The Respondent has further pointed out that para 3 of Notice of Invocation of Corporate Guarantee 12.06.2020 reads as under:

*“3. Pursuant thereto, Issuer company and ITSL executed a Debenture Trust Deed on 22 May, 2015 ("DTD") recording inter alia the various terms and conditions as well as Issuer Company's and ITSL's obligations in respect of the said NCDs including but not limited to redemption of the said NCDs, payment of redemption premium thereon as well as the creation of necessary security. Pertinently, under the DTD, **the tenure of the said NCDs was to end on 22nd May, 2020** (the redemption date) and the Issuer Company was obliged to pay to the Debenture Holders the principal amount, redemption premium and default interest (if any) on the maturity of the said NCDs as detailed under the DTD”.*

36. It is clear from the aforementioned para of the Notice of Invocation of Corporate Guarantee dated 12.06.2020, the date of maturity of the NCDs was 22.05.2020. The Respondent has argued that on the basis of the Demand Notice dated 12.06.2020, the payment was to be made by the Corporate Guarantor/ Respondent within two business working days. However, the payment was not made as demanded vide notice dated 12.06.2020 and, therefore, the default took place on 16.06.2020 as 13.06.2020 and 14.06.2020 happened to be holidays being Saturday and Sunday.

37. During the course of the argument, the Applicant has argued that there exists a continuous cause of action considering the fact that some amount was realized by the Applicant from sale of shares (pledged securities) and, therefore, the date of default should be considered as

15.05.2022. According to the Counsel for the Applicant, the Corporate Debtor failed to comply notice dated 13.05.2022 post invocation of pledge on 12.06.2020 following which shares of Zee Enterprises Limited took place in August 2020 while sale of shares of Dish TV India Limited took place in November 2020. The Counsel for the Applicant has further pointed out that the Corporate Debtor challenged the pledge invocation dated 12.06.2020 before the Hon'ble Delhi High Court which was rejected. Subsequently, an amount of Rs. 160.34 Crores was realized from the sale of the pledged shares, an amount of Rs. 591.81 Crores became due and payable on 09.05.2022. Thereafter, demand notice dated 13.05.2022 was issued. Therefore, according to the Counsel for the Applicant, the date of default should be considered as 13.05.2022.

38. We have thoughtfully considered the aforesaid contentions raised on behalf of the Financial Creditor but have found the same to be devoid of any force or substance. As stated above, admittedly the maturity date of the NCDs was 22.05.2020. Consequent upon maturity date, when the payment was not made by the Corporate Debtor, the Financial Creditor invoked the Corporate Guarantee vide the notice dated 12.06.2020 calling upon the Respondent to pay the outstanding amount within a period of two days. Therefore, it is crystal clear that the default took place when the payment was not made by the Respondent even after the guarantee was invoked by the Applicant vide notice dated 12.06.2020. It is a settled proposition of law that the date of default once occurs cannot be changed or extended. There might be many events of default but for the purpose of Section 7 of the Code, the first date of default is to be taken into consideration. Undisputedly, in the instant case, the first default was made by the Respondent within a period of two days after the receipt of notice dated 12.06.2020. Therefore, certainly, the default took place in June 2020 which is covered under Section 10A period. Merely because subsequent to the notice dated 12.06.2020, some steps were taken by the Financial Creditor to recover some money by exercising its right to sell the pledged shares would not mean that the date of default would get shifted

if another notice was subsequently issued by the Financial Creditor in the year 2022 post sale of pledged of shares.

39. Taking into considering the foregoing discussion, we are of the considered view that in this case the default took place in the month of June 2020 which is clearly covered under the period excluded under Section 10A of the Code. That being so, the instant Petition cannot be maintained being barred by Section 10A of the Code and is, therefore, dismissed. However, this order will not in any manner preclude the Financial Creditor from proceeding against the Respondent for the recovery of the outstanding amounts before any other forum/court of law having competent jurisdiction in accordance with law and nothing observed herein before should be construed to mean that the debt in question has extinguished.
40. Accordingly, CP. IB. No 831 of 2022 is **dismissed** and **disposed of**.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)